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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications, Inc.,	)	
Pursuant to Section 271 of the	)	CC Docket No. 97-121
Telecommunications Act of 1996	)	
to Provide In-Region, InterLATA Services	)	
in Oklahoma	)	

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

Before SBC's application for interLATA authority can be granted, SBC must show that it complies with each of four distinct requirements in Section 271 of the Communications Act. Cox submits these comments to demonstrate that SBC's showing is deficient in three of those four areas.

First, SBC has not met its checklist requirements. By virtue of the requests for interconnection it has received, SBC must show that it has "fully implemented" the checklist, not that it merely "offers" services (or will offer services on request) that could comply with the standards in Section 271(c)(2)(B). SBC's most fundamental failure is that it has yet to establish permanent rates for *any* of the items of the checklist, so its rates cannot be found to be consistent with Sections 251 and 252 of the Act. This prevents the Commission from finding that SBC has met items (i), (ii), (iv), (v), (vi), (x), (xiii) and (xiv) of the checklist.

At the same time, Cox's experience shows that SBC has not complied with the requirements for interconnection and numbering administration. SBC has delayed provision of interconnection and imposed unreasonable conditions on the use of certain interconnection facilities, with the result that a minimum of ten months (and likely more) will have elapsed between Cox's initial request for physical collocation in Oklahoma City and the time that Cox actually can use those facilities to serve customers. Similarly, SBC's administration of telephone numbering in Oklahoma has created significant uncertainty regarding Cox's ability to obtain numbering resources, with similar effects on Cox's ability to plan its entry into the

local exchange marketplace. Thus, SBC has failed to meet its checklist obligations, both generally for all new entrants and specifically as to Cox.

The Commission also cannot find that the public interest is served by grant of this application. While SBC asserts that the public interest "presumptively" is served by the addition of a new competitor to the crowded long distance market, that is not the case. Rather, SBC bears the burden of proof to demonstrate that its entry will serve the public interest, in light of its own actions in response to the potential development of competition.

SBC fails that test. First, the Commission cannot credit the claim that SBC is powerless to harm competition. Indeed, the very example SBC cites — the cellular industry — was the subject of a Commission finding less than nine months ago that incumbent LECs had consistently engaged in harmful, discriminatory conduct. The record of SBC's actions in Oklahoma also demonstrates that it actively attempts to thwart competition. In "negotiations" with Cox, SBC showed no willingness to consider any modifications to its positions on substantive pricing issues. SBC even substituted objectionable provisions it had agreed to remove in what was supposed to be the final version of the agreement for signature. SBC's behavior in negotiating for physical collocation was equally objectionable. In addition to the delays described above, SBC initially proposed prices that were far in excess of any reasonable estimate of properly allocated costs. Even the final prices, which are about one-fourth what SBC originally proposed, are substantially higher than those available in other parts of the country. This behavior effectively has acted as a barrier to Cox's entry into the local telephone market in Oklahoma.

Finally, although SBC is required to demonstrate that it is complying with the separate subsidiary requirements of Section 272, its showing is deficient in two specific areas. To show its compliance with financial and accounting separation requirements, SBC must demonstrate that all costs of this application, direct and indirect, are being paid for solely with funds from its long distance affiliate. SBC also must show how it will comply with CPNI requirements that limit its ability to joint market local and long distance service. Because it has not done so, SBC's application cannot be granted.

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COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox") hereby submits its comments on the above-captioned application of SBC Communications, Inc. ("SBC").

A Cox subsidiary is the cable operator serving Oklahoma City, Oklahoma. As is the case in many of Cox's cable markets across the country, Cox actively is engaged in entering the local telephone market in Oklahoma City, and expects to provide a significant facilities-based alternative to SBC's affiliate Southwestern Bell Telephone Company ("Southwestern Bell") for both residential and business customers. Cox Oklahoma Telcom, Inc. ("Cox Telcom") has been certificated by the Oklahoma Corporation Commission (the "OCC") to provide local exchange service and has entered into an interconnection agreement with Southwestern Bell. That agreement has yet to be approved by the OCC. Cox Telcom plans to begin providing local telephone service in Oklahoma City. Cox is taking the expensive and complicated steps to comply with the regulatory requirements, gain a suitable interconnection agreement and ready its network. Cox has not, however, begun to provide service. Cox does not yet have an approved interconnection agreement and it must receive

physical collocation from Southwestern Bell and complete the upgrade of its network so that the reliability Cox cable customers have come to expect can also be delivered to Cox's telecommunications customers.[1/]

INTRODUCTION

Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, prohibits the provision of in-region interLATA services by Bell operating companies ("BOCs") until, as measured by their compliance with certain specific conditions, the BOCs' monopoly over local exchange service has been replaced by facilities-based competition. Those conditions are critical to two of the key objectives of the 1996 Act — namely, enhancing competition in the provision of interLATA service and establishing competition in the provision of local exchange service. Allowing the BOCs to provide in-region interLATA service will increase competition in the already-competitive long distance market. Such an incremental gain in long distance competition is not in the public interest, however, if the BOCs continue to possess, by virtue of their local exchange monopolies, the incentive and means to enter in-region interLATA markets in an *anticompetitive* manner. Requiring the BOCs to establish genuine conditions of competition in their local exchange markets before they are allowed to provide in-region interLATA

1/ Cox currently is ranked first among major cable operators in customer satisfaction. *See* J. D. Power and Associates New Report Reveals Cable TV Companies Face Uphill Battle, PR Newswire Association, Inc., October 3, 1996 (describing finding that Cox "had a significant lead over" the other leading Cable television providers in customers satisfaction). Available in LEXIS, News Library, CURNWS File.

services provides "a powerful incentive for BOCs to open up the local market"[2/] — an incentive which would not otherwise exist.

From SBC's perspective, however, the conditions of entry set forth in Section 271 are treated as mere formalities, requiring nothing more than offers and promises by a BOC, to be rubber-stamped for approval and authorization by the Federal Communications Commission. Thus, while the 1996 Act requires BOCs that have received requests for access and interconnection to *provide* such access and interconnection in compliance with the requirements of a 14-point competitive "checklist," SBC contends that it need only *offer* to provide access and interconnection. And, while the 1996 Act requires the Commission, before authorizing the provision of in-region interLATA services, to find *both* that the BOC has "fully implemented" the competitive checklist *and* that such authorization "is consistent with the public interest, convenience, and necessity," SBC contends that a BOC's provision of interLATA service "presumptively will further the public interest,"[3/] so that compliance with the competitive checklist is the *only* "threshold test for full Bell company entry into long distance markets."[4/]

2/ *Order*, In the Matter of Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona ("LATA Consolidation Order"), DA 97-767, ¶ 28 (released April 21, 1997).

3/ *See* Brief in Support of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma ("SBC Brief"), filed April 11, 1997 at 53 (emphasis in original).

4/ *Id.* at 56.

By suggesting that the Commission give short shrift to the parts of Section 271 that are intended to foster long-term facilities-based local exchange competition so that BOCs might provide interLATA services as rapidly as possible, SBC has turned the 1996 Act's priorities upside down. As shown below (and as SBC effectively concedes), SBC is not providing access and interconnection to telecommunications carriers in a manner that complies with the requirements of the competitive checklist and, indeed, has not come close to meeting the 1996 Act's objective of opening its local exchange markets to competition. Moreover, wholly apart from its noncompliance with the checklist, SBC has engaged in conduct specifically aimed at inhibiting and preventing the offering of competitive services in its local exchange markets — conduct that belies its promises to facilitate such competition. In these circumstances, the public interest would not be served by allowing SBC to provide in-region interLATA services, thereby removing SBC's sole and most powerful incentive to provide the necessary foundation for local competition.

I. SBC DOES NOT PROVIDE ACCESS AND INTERCONNECTION TO TELECOMMUNICATIONS CARRIERS IN A MANNER THAT COMPLIES WITH THE REQUIREMENTS OF SECTION 271.

A. SBC Must Provide All Aspects of Access and Interconnection Set Forth in the Competitive Checklist; Neither Mere Promises Nor Statements of Terms and Conditions Are Sufficient.

The Commission may not grant SBC's application unless it finds, *first*, that SBC "has met the requirements of subsection (c)(1)."[5/] Those requirements can be met by a BOC in two ways — either (1) by entering into one or more state-approved, binding interconnection

5/ 47 U.S.C. § 271(d)(3)(A).

agreements specifying the terms and conditions on which it "is providing" access and interconnection to a competing facilities-based provider of local exchange service, in accordance with subsection (c)(1)(A); or (2) if no competing facilities-based provider of local exchange service has requested access and interconnection, by obtaining state approval of a statement of the terms and conditions on which the BOC "generally offers" to provide such access and interconnection, in accordance with subsection (c)(1)(B).

In addition, the Commission must find that

> (i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has *fully* implemented the competitive checklist in subsection (c)(2)(B); or
>
> (ii)with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B).[6/]

According to SBC,

> [a] Bell company's decision as to how it will satisfy section (c)(1) does not narrow its options for showing compliance with the checklist. Regardless of how it fulfills the requirements of subsection (c)(1), the applicant may rely upon a statement of terms and conditions, or state-approved agreements, or both, to show compliance with the checklist.[7/]

This plainly is not true. As set forth above, the statutory language clearly provides that if a BOC satisfies Section (c)(1) by entering into state-approved agreements to provide access and

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6/ 47 U.S.C. § 271(d)(3)(A) (emphasis added).

7/ SBC Brief at 15.

interconnection, it must fully implement the checklist with respect to such access and interconnection.

As the language demonstrates, Section 271(c)(2)(A)(ii) (which permits checklist compliance via a statement) is available *only* if the statement complies with Section 271(a)(1)(B), which is mutually exclusive with Section 271(a)(1)(A). Equally important, a BOC can comply with Section 271(c)(2)(A)(i) only if it *fully implements* the checklist, which precludes reliance on the statement. Thus, a BOC cannot partially implement the checklist in its agreements and rely on a state-approved statement for the checklist items that are not included in the agreements. Similarly, if the BOC purports to satisfy Section (c)(1) with a state-approved statement of terms and conditions, it must include in that statement all of the items in the competitive checklist, regardless of any checklist items that might be included in certain state-approved agreements.

Of course, a BOC may not rely on a state-approved statement at all unless no competitive provider of local exchange service has requested access and interconnection prior to three months before the BOC files its Section 271 application. SBC contends that it is entitled to rely, in Oklahoma, on *both* a state-approved agreement *and* a state-approved statement because, while it has entered into an agreement with Brooks Fiber, that company did not qualify as a competitive local exchange carrier by providing facilities-based service until January 15, 1997, less than three months before SBC filed its application. Under SBC's circular reasoning, the only requests for access and interconnection that preclude a BOC from relying on Track B to obtain in-region interLATA authorization are requests from entities that already have begun providing facilities-based service.

This cannot be right. The point of Track B is "to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because *no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market.*"[8/] If one or more facilities-based carriers *have* sought to enter the market and have requested access and interconnection for the purpose of doing so, it would make no sense to allow a BOC to refuse to fully implement interconnection and access agreements with the new entrants and then use Track B to gain interLATA entry on the grounds that the new entrants have not begun providing service.[9/]

Therefore, because new entrants have requested access and interconnection, the Track B option of relying on a state-approved statement simply is not available to SBC in Oklahoma, and the offerings set forth in SBC's statement are not relevant to SBC's Section

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8/ H.R. Conf. Rep. No. 104-458 ("Conference Report") at 148 (emphasis added). The absurdity of SBC's contention is obvious when one considers how essential the availability of interconnection with the ILEC is to enter the local exchange market. It would make no sense for any would-be competitor first to expend the enormous capital required to construct facilities that merely enable the competitor's customers to communicate with one another and only afterwards to seek interconnection with the ubiquitous incumbent to allow its customers the ability to communicate with the outside world. Yet that is what SBC's interpretation would require.

9/ By the same token, a new entrant cannot preclude a BOC from obtaining interLATA authorization by requesting access and interconnection and then either failing to negotiate an agreement in good faith or failing to comply, within a reasonable period of time, with an implementation schedule contained in such agreement. In such circumstances, the BOC would be permitted to proceed under Track B. *See* 47 U.S.C. § 271(c)(1)(B). This provision demonstrates that Congress understood that there would be a lag between requesting interconnection and providing service, and that it did not intend for normal delays to permit BOCs to jump to Track B. This is especially important because, as shown below, the BOC has the ability to delay a new entrant's provision of service. *See infra*, Part II.

271 application.[10/] To gain approval of its application, SBC must demonstrate that it has met the requirements of subsection (c)(1)(***A***) by having entered into access and interconnection agreements with facilities-based providers and that it has "fully implemented the competitive checklist" with respect to such agreements.

SBC contends that it can meet these requirements in any event simply by showing that its agreements include terms and conditions for the provision of all 14 checklist items, even if not all items are actually being furnished to a competitive provider. This, too, is wrong. To meet the requirements of subsection (c)(1)(A), a BOC must have entered into agreements specifying the terms and conditions under which it "*is providing* access and interconnection," and, pursuant to subsection (c)(2)(A), it must show that it "*is providing* access and interconnection" that meets the requirements of the competitive checklist. SBC claims, in effect, that "providing" means nothing different than "promising to provide" or "offering to provide":

> [A] Bell company "provides access" to its facilities and services through an interconnection agreement when the CLEC has a contractual right to obtain the facilities and services, whether or not they are taken.[11/]

SBC's approach blurs the distinction between promise and performance — a distinction that Congress recognized as critical in determining whether a BOC has complied

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10/ As shown below, even if Track B were available, SBC would not meet its requirements because the OCC has yet to approve permanent rates for checklist services. *See infra*, Part II.

11/ SBC Brief at 16.

with the requirements of the competitive checklist. Thus, according to the Conference Committee Report,

> [t]he requirement that the BOC "is providing access and interconnection" means that the competitor has *implemented* the agreement and the competitor is operational. This requirement is important because it will assist the appropriate State commission in providing its consultation and in the explicit factual determination by the Commission . . . that the requesting BOC has fully implemented the interconnection agreement elements set out in the "checklist" under new section 271(c)(2).[12/]

As the House Commerce Committee understood, "'openness and accessibility' requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements."[13/] If mere promises of nondiscriminatory access and interconnection were all that the 1996 Act required in order to be allowed to provide in-region interLATA service, Section 271 would surely provide BOCs with a "powerful incentive" to make such promises, but it hardly would provide an incentive to implement those promises in a manner that meaningfully opens the BOCs' facilities to local competition.

SBC suggests, on the other hand, that if BOCs were required not only to offer but actually furnish all of the checklist items to competitive local carriers before they could be authorized to provide interLATA services, then competitive local carriers would strategically refrain from purchasing all items to thwart BOC entry into the interLATA market. This is a red herring, both in theory and in fact. In theory, *some* CLECs — in particular, those that also provide long distance service — might have an incentive to seek to delay a BOC's

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12/ Conference Report at 148 (emphasis added).

13/ H.R. Rep. No. 104-204, at 77 (1996).

provision of in-region interLATA service. But there is no reason why other CLECs, such as Cox or Brooks Fiber, would have any such incentive. Furthermore, as a matter of fact, one or another of the competitive providers seeking access and interconnection *has* requested each of the checklist items.[14/]

In any event, the threshold issue in this proceeding is not whether a BOC should be authorized to enter the interLATA market if it provides only those checklist items that have been requested by competing local exchange providers. It is whether a BOC can be authorized to provide interLATA service, as SBC contends, when it has not yet even begun actually furnishing all those checklist items that competing providers *have* requested but has only *promised* or *agreed* to provide them. Indeed, even SBC's promises are contingent on the outcome of the pending appeal of the Commission's *Local Competition Order*.[15/] To grant authorization in such circumstances would make the safeguards and incentives of the competitive checklist meaningless. This is not what Congress intended, and it is not what the language of the statute requires.

B. It Is Apparent Already That SBC's Performance Does Not Meet the Standards of the Competitive Checklist.

For the reasons discussed above, a BOC's compliance with the competitive checklist — particularly those items of the checklist that require nondiscriminatory access to various

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14/ In any event, Congress included specific "safety valve" language in Section 271(c)(1)(B) to account for this contingency. *See* note 9, *supra*. SBC has not attempted to show that this requirement has been met.

15/ *Iowa Utilities Board et al v. FCC*, No. 96-3321 (8th Cir. argued Jan. 17, 1997). *See* SBC Brief at 22 n.22.

elements of the BOC's network and to various BOC services — can be assessed only after the BOC has actually begun furnishing such elements to competitive providers. Therefore, SBC's failure to begin implementing many of the promises of its access and interconnection agreements is sufficient reason to deny its Section 271 application.

But even with respect to those aspects of the agreements that it has begun to implement, SBC's performance clearly does not meet the requirements of the competitive checklist. In particular, the checklist requires first of all that a BOC seeking interLATA authorization comply with the interconnection requirements of sections 251(c)(2) and 252(d)(1). A key element of those requirements is that interconnection be provided on rates, terms and conditions that are determined by the relevant State commission to be nondiscriminatory and cost-based under the standards of Section 252(d). But the interconnection rates imposed by SBC in its agreements with competing carriers have *not* been found by the Oklahoma Corporation Commission to be nondiscriminatory and cost-based.

As SBC notes, the rates for interconnection that are specified in its agreements are the "interim rates that were approved by the OCC in the AT&T arbitration."[16/] Those rates were approved only on an "interim" basis precisely because cost studies — undertaken by SBC and under review by the OCC to determine whether the rates are based on costs plus a reasonable profit or, in the case of reciprocal transport and termination, based on additional costs — had not been completed. The OCC has made no finding, either in connection with the AT&T

16/ SBC Brief at 22.

arbitration or in reviewing SBC's agreements with Cox and other carriers, that the interim rates in any agreement (or in SBC's statement) comply with the specific statutory standard of Section 252(d).

SBC's reliance on "the Commission's recognition that interim rates are a practical necessity"[17/] is wholly misplaced. Interim rates may, indeed, be a necessity to ensure that implementation of interconnection pursuant to Section 251 is not unduly delayed while State commissions ascertain that the rates for such interconnection are consistent with statutory requirements. As the Commission recognized in the *Local Competition Order*, interim rates are particularly important to jump start competition.[18/] It hardly follows, however, that BOCs should be deemed to have opened their local markets to competition and be authorized to enter competitive interLATA markets on the basis of rates that have not yet been found to be compliant with statutory cost standards. Indeed, the Act does not permit such authorization.

For similar reasons, SBC cannot yet claim to have implemented "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)," as required by the checklist.[19/] To do so requires obtaining a determination by State commission, based on the standards in Section 252(d)(2), that the terms and conditions for reciprocal compensation are based solely on the additional cost that the exchange of traffic imposes.

17/ *Id.* at 21-22.

18/ Implementation in the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499 (1996) (*"Local Competition Order"*) at 15891.

19/ 47 U.S.C. § 271(c)(2)(B)(xiii).

The OCC has not yet made such a determination because, again, the rates that have been adopted are interim, not permanent, rates. Indeed, the Administrative Law Judge that reviewed SBC's Section 271 application specifically acknowledged that the interim rates had *not* been set under the standard of Section 252(d).[20/]

The absence of permanent prices represents a general failure to meet the checklist requirements. In Cox's case, SBC's conduct has violated the checklist requirements in at least two additional specific areas. For instance, SBC has impeded Cox's access to interconnection in accordance with the requirements of Section 251(c)(2), thus failing to comply with item (i) of the checklist. As described in the declaration of Jeff Storey, Cox's Oklahoma Network Operations Director, Southwestern Bell has subjected Cox to months of delays and ever-shifting proposals for interconnection, and continues to impose unreasonable restrictions on interconnection facilities provisioned by Southwestern Bell.[21/] As a result of Southwestern Bell's delays Cox does not expect to be able to establish *any* interconnection with Southwestern Bell until June, or to obtain physical collocation until late summer, despite having made its initial request on October 15 of last year.[22/] These delays are unacceptable, and demonstrate that Southwestern Bell is not complying with its obligations under Section 251(c)(2) or, consequently, under the checklist.

20/ Report and Recommendations of the Administrative Law Judge, Cause No. PUD970000064, Oklahoma Corporation Comm., released April 21, 1997 at 36.

21/ *See* Declaration of Jeff Storey, attached hereto as Exhibit A (the "Storey Declaration") at ¶¶ 4-9.

22/ *Id* at 6.

Finally, compliance with item (ix) of the checklist requires the provision of nondiscriminatory access to telephone numbers. SBC has *agreed* to provide Cox with such access, but its performance has not matched its promise. On January 7, 1997, in preparation for its provision of local exchange service, Cox reserved ten NXX codes for use in Oklahoma. Two months later, on March 13, SBC informed Cox that its reservations could not be honored and assigned, ostensibly because of an impending shortage of available NXX codes that had resulted in the declaration of the 405 area code as a "jeopardy NPA." Instead, no more than a *total* of 10 NXX codes per month would be made available to *all* code applicants.

A refusal to allocate sufficient telephone numbers to enable competing carriers to meet anticipated demand does not constitute nondiscriminatory access. It would not constitute nondiscriminatory access, even if all competing providers (including SBC) were subject to a moratorium or delay in the assignment of new numbers. Access to numbers is critical to enable new CLECs like Cox to offer any significant competition to SBC, which, of course, already has access to enough numbers to serve 100 percent of the existing local exchange market.

It may be that SBC has prematurely declared the 405 NPA to be in jeopardy or has chosen a means of dealing with such jeopardy status that is likely to be most effective in impeding competitive entry. Any such evidence that SBC is deliberately thwarting competitive entry would not only demonstrate noncompliance with the checklist requirement of nondiscriminatory access but would also (as discussed below) clearly warrant dismissal of the application as contrary to the public interest. But even if the refusal to assign sufficient numbers were the only available response to a bona fide jeopardy situation, the result would

still be the effective denial of nondiscriminatory access to numbers. If the shortage of numbers unfortunately delays the nondiscriminatory availability of numbers to SBC's competitors, it also unfortunately delays SBC's compliance with its checklist obligations — and its authorized provision of in-region interLATA services.

Moreover, there were alternatives to eliminating all NXX code reservations. For instance, the NXX code assignment guidelines permit increasing fill rates required for new code assignments, which reduces demand. For that matter, SBC, as number administrator, could have accepted Cox's reservation, subject to recall if the jeopardy situation required assignment of the requested codes to other telecommunications carriers. More fundamentally, declaration of jeopardy before an area code relief plan is proposed reflects less than optimum management of numbering resources by SBC. Because jeopardy declarations affect new and rapidly growing carriers disproportionately, they confer competitive advantages on SBC and other established carriers. Thus, SBC's failure to manage NXX code assignments and area code relief effectively and in a non-discriminatory manner constitutes additional evidence that SBC has not met its numbering obligations under the checklist.

II. GRANTING SBC'S APPLICATION WOULD NOT BE IN THE PUBLIC INTEREST.

A. The Determination of Whether an Application Is in the Public Interest Must Be Based on Factors *Other Than* Whether the Applicant Has Fully Implemented the Competitive Checklist.

The Commission may not approve SBC's requested authorization to provide in-region interLATA service unless it finds such authorization to be "consistent with the public interest,

convenience, and necessity."[23/] SBC essentially reads this restriction out of the Act. It contends, first, that compliance with the requirements of the competitive checklist is all that is required to serve the public interest in opening the *local* market to competition: "Congress viewed satisfaction of these requirements, and *only* these requirements, as the appropriate threshold test for full Bell company entry into long distance markets."[24/] Second, it argues that "the entry of an additional provider of interLATA services in Oklahoma *presumptively* will further the public interest"[25/] — a presumption that can only be overcome with "clear and convincing evidence that SBLD's entry will harm consumers."[26/]

There is no basis in the Act for either of these contentions. Compliance with the checklist requirements is a prerequisite to Section 271 authorization, but it plainly is not the only threshold requirement. Section 271(d) requires that there be actual competition (or, in some cases, a valid statement of available terms), *and* that the competitive checklist be fully implemented, *and* that the requested authorization be consistent with the public interest, *and* that the BOC comply with Section 272's separation requirements. In this statutory context, it is obvious that the public interest test is in addition to the checklist; otherwise Congress would not have included it.[27/]

23/ 47 U.S.C. § 271(d)(3)(C).

24/ SBC Brief at 56 (emphasis in original).

25/ *Id.* at 53 (emphasis in original).

26/ *Id.* at 55.

27/ *See, e.g., Crandon v. U.S.*, 494 U.S. 152, 158 (1990) (the Supreme Court looks to "design of statute as a whole"); *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (statutes should be interpreted so as not to render one part

Moreover, the language of Section 271(d) hardly warrants or embodies a presumption that authorizing BOCs to provide interLATA service is in the public interest. To the contrary, Section 271(d) generally provides that the Commission shall *not* approve the requested authorization *unless* it finds the authorization to be consistent with the public interest. This suggests, if anything, that an applicant must overcome an initial presumption *against* allowing interLATA entry.[28/] Indeed, such a presumption would not be unreasonable given that, prior to the 1996 Act, in-region interLATA entry was deemed to pose such anticompetitive risks that it was flatly *prohibited.*

SBC is right in arguing that "[t]he Commission's public interest review must be conducted within applicable statutory boundaries," consistent with "the purposes of the regulatory legislation."[29/] But SBC has gotten the legislative priorities topsy-turvy by suggesting that the principal legislative goal to be taken into account by the Commission is "promot[ing] rapid Bell company entry" into interLATA services.[30/] The more important legislative objective embodied by Section 271 and by the bulk of Title I of the 1996 Act is facilitating competition in the provision of local exchange service. As the Commission has recognized, Congress purposely linked interLATA entry to the creation of facilities-based

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inoperative); *see also* 2A Sutherland Stat. Const.§ 46.06 ("A statute should be construed so that effect is given to all its provisions").

28/ *Compare* 47 U.S.C. § 271(d) *with* 47 U.S.C. § 309(a) (public interest requirement for radio licenses). *See Radio Carrollton*, 72 FCC 2nd 264, 270-71 (1979); (applicant bears burden of demonstrating public interest) *WWLE, Inc.*, 85 FCC 2nd 68, 85 (1981) (burden of proof is on applicant).

29/ SBC Brief at 52, quoting *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

30/ Id. at 53.

local competition to give the BOCs a "powerful incentive" to facilitate such competition.[31/] Moreover, BOC entry only serves the 1996 Act's procompetitive purposes when the anticompetitive risks and incentives that stem from the local exchange monopoly — the risks and incentives that were the basis for the previous prohibition on such entry — are eliminated by the BOC's actions, not its promises.

Accordingly, any evidence that suggests that a BOC is willfully acting to impede competitive local entry should be highly relevant to the Commission's public interest analysis. Especially if the Commission were to agree with SBC that compliance with the competitive checklist required only an agreement to provide — and not actual provision of — all checklist items, any evidence indicating that the BOC was likely to be recalcitrant in actually *implementing* its agreement or was likely to take other actions to stall or block competitive entry must weigh heavily against a Section 271 authorization.[32/] In short, if the prospect of interLATA entry continues to provide a necessary incentive to facilitate rather than impede local competition, it would not be in the public interest for the Commission to remove that incentive.

31/ LATA Consolidation Order at ¶ 28.

32/ The Commission also should recognize that although Section 271 permits revocation of a BOC's interLATA authority, it will be very difficult to take such action after a BOC begins providing service.

B. SBC's Conduct in Seeking To Obstruct Competitive Entry Indicates That Removing Its "Most Powerful Incentive" to Open the Local Market Would Not Serve the Public Interest.

There is, at this point, no reason to believe that SBC would fully implement the competitive checklist and foster the conditions of local competition absent the incentives provided by Section 271. SBC's past and current conduct indicates that it would do everything in its power to frustrate the establishment of effective, near-term local competition.

Initially, the Commission should not give any weight to SBC's claims that it cannot harm competition. Indeed, the actual history of wireless interconnection, cited by SBC as an example, demonstrates that the BOCs have long had the power to discriminate against their potential competitors. While SBC says there was no discrimination in the provision of cellular interconnection, the Commission found precisely the opposite in its *Local Competition Order,* stating that:

> Based on the extensive record in the *LEC-CMRS Interconnection* proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules. . . . We find that extending the opportunity to establish symmetrical reciprocal compensation for the transport and termination of traffic addresses inequalities in bargaining power that incumbent LECs [] used to disadvantage interconnecting wireless carriers.[33/]

Moreover, SBC's attempted citation of the cellular industry's relative success misses the point: The excessive, non-reciprocal interconnection rates imposed by SBC and other BOCs ensured

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33/ *Local Competition Order* at 16044-16045 (footnote omitted).

that cellular service could not compete with traditional local exchange service. By shunting cellular into a different market segment, the BOCs protected themselves from competition that otherwise might have reduced their market share and profits in the local exchange marketplace. This is the essence of what the 1996 Act is intended to prevent.

Cox's experience confirms that SBC continues to thwart the development of competition. From the outset of the process of negotiating an agreement, SBC's conduct, as described in the attached declaration of Carrington Phillip, was not promising. Indeed, with respect to substantive issues related to pricing, SBC generally was unwilling to "negotiate" at all. SBC set forth its prices and then refused any attempt at compromise.[34/]

Particularly troublesome were the changes that SBC attempted to impose unilaterally *after* Cox believed that negotiations had been concluded. SBC presented Cox with an agreement for signature that contained several provisions that were at variance with the terms agreed to by the parties — including, in some cases, language that had appeared in SBC's first draft of the agreement but subsequently had been amended in negotiations. For example, the supposedly final version prepared by SBC increased the agreed upon installation intervals for some service elements from a period of 90 days to as much as 120 days — a change that would have the obvious result of delaying the introduction of competitive service. SBC also unilaterally added a binding arbitration requirement to the collocation provisions of the agreement. Even though Cox caught and rejected these unilateral changes in the agreement, correcting them delayed the execution and filing of the agreement by approximately two

34/ *See* Declaration of Carrington Phillip, attached hereto as Exhibit B, at ¶ 4.